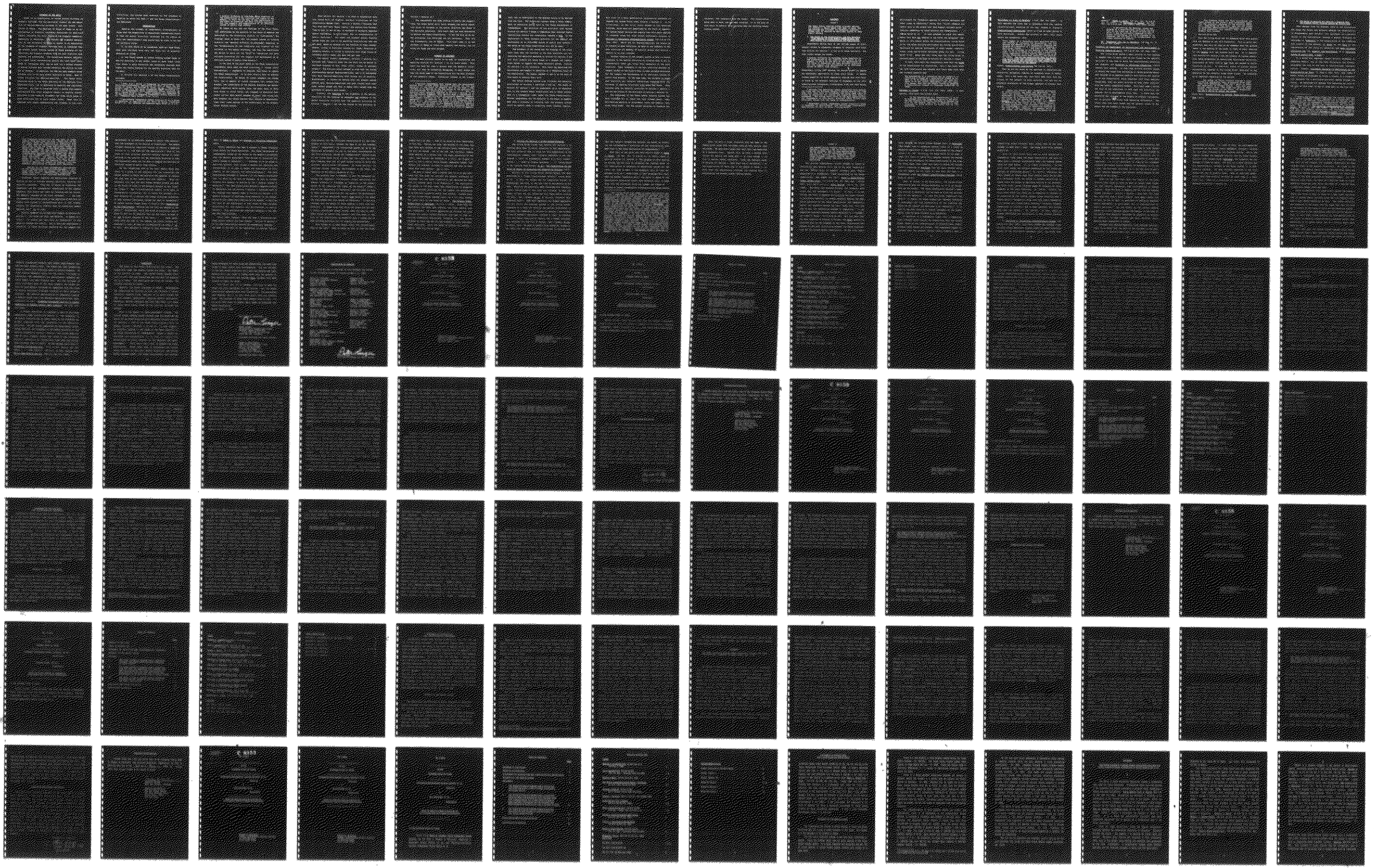
C-8353 SUPREME COURT OF TEXAS CASES 014
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)



## INTEREST OF THE AMICI

LULAC is an organization of United States citizens of Hispanic heritage, and has particular concern for the education of Mexican-American children in the poor school districts of Texas. The American GI Forum of Texas is an organization of Hispanic veterans, dedicated to American ideals, including the civil rights of the Hispanic community, especially in education. The Chicano Law Students Association of the University of Texas at Austin is an association of law students of Hispanic heritage that is concerned that the present school funding system of Texas prevents all but relatively few Hispanic students from the poor districts from reaching the professions. The United Farm Workers (AFL-CIO) is a labor union representing people who work with their hands at low-paying jobs, and as such has a strong interest in seeing children gain through education the ability to rise out of poverty. In addition, the UFW has many members whose children live in the poor school districts of Texas. Most of these children are Mexican-American. The Texas Civil Liberties Union is the Texas affiliate of the American Civil Liberties Union, and is dedicated to equality and individual liberties. The TCLU is concerned about a system that permits businesses and other property owners in wealthy school districts to pay taxes at extremely low rates while those in poor districts pay at much higher rates. When this is combined with higher expenditures per student in the rich

districts, the system goes contrary to the concepts of equality to which the TCLU -- and the Texas Constitution-- are dedicated.

## INTRODUCTION

Despite the attempt of respondents alternatively to argue that few disparities in educational expenditures exist[1] or that the poorer districts' problems are the result of their own improvidence,[2] some points must be clear to all but the willfully blind:

1) in this world of an automated, post-oil boom Texas, most poor children have only two ways out of poverty: education or crime;

2) the Texas system of school funding allows those in wealthy districts to pay school taxes at much lower rates than those in poor districts and conversely provides much higher per capita funding for the wealthy districts than for the poor;

3) Article VII section 1 of the Texas Constitution provides:

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[1] See, e.g., Brief in Response to Petitioners' and Petitioner-Intervenors' Application for Writ of Error for the State of Texas, and William N. Kirby, et al. ("Texas-Kirby Brief") page xiii and seven unnumbered pages following it; Brief of Respondents Eanes Independent School District, et al., ("Eanes Brief") 3-7. These arguments are responded to in the Reply Brief of Edgewood Independent School District et al. ("Edgewood Reply Brief") 7-10, 11-12.

[2] See Andrews Independent School District et al.'s Brief in Response to Application for Writ of Error ("Andrews Brief") 32. For response see Edgewood Reply Brief at 15 n.6.

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

To these we may add the findings of the Trial Court, left undisturbed by the majority in the Court of Appeals and described by the dissenting justice as "undisputed." The findings leave no doubt that the present system of funding prevents the "general diffusion of knowledge" essential to the "preservation of the liberties and rights" of the children in the poorer districts, and that the Legislature has failed to carry out its "duty" to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

In the face of the plain words of the Texas Constitution respondents weave webs and make intricate -- though often contradictory -- arguments to convince this Court to ignore the Texas Constitution. It is this Court's duty to enforce the Constitution. No amount of clever argument can change this, and no amount of clever argument can change the scandal: the inhabitants of the wealthy districts get better public education while paying less; the poor, many of whom have brown or black faces, are trapped in districts that cannot attract more wealth because of their high taxes and poor schools, but cannot improve their schools or appreciably lower their taxes because of the inefficiency of the present school funding system.

When Article VII section 1 is read in conjunction with the Texas Bill of Rights, further violations of the Constitution become clear. Article I section 3 declares that "all free men" have "equal rights," and carries this further: "and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Yet under the present school funding system those who live in the wealthier districts pay less and get more, based on nothing but the location of their houses. Others, living in districts lacking oil lands, factories or shopping centers, or living in districts with large tracts of untaxable public lands, pay more and get less.

The equal rights amendment, Article I section 3a, provides that "equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." The District Court refused to find that the system discriminated against Mexican-Americans, and it is undisputed that many Mexican-Americans have broken out of poverty. Nonetheless, it cannot be denied that the present system affects poor Mexican-Americans and poor blacks more than other ethnic groups and that it makes their escape from the quicksand of poverty much harder.

Finally, the favoring of the taxpayers in the wealthy districts at the expense of taxpayers and students in the poorer districts violates both the equality provision of Article I section 3 and the due course of law provision of

Article I section 19.[3]

The Legislature has made efforts to modify the disparities, but great gulfs still exist between the public education given to children in the poorer districts and those in the wealthier districts. This Court does not have discretion to enforce the Texas Constitution. It has the duty to do so. The provisions just described are not hortatory. They are the fundamental law of Texas. This Court owes it to the children of Texas to treat them equally and fairly, not to wring its hands and give excuses.

## SUMMARY OF ARGUMENT

The most critical factor to be used in interpreting and applying Article VII section 1 is its plain words. This Court has held for over a century that the people's intention, not that of convention delegates, is what counts and that the words used in the Constitution are the best evidence of the people's intent. Historical context is not irrele-

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[3] Various respondents have argued that the petitioners waived their claims under Article I section 19, and the majority in the Court of Appeals said in its note 2 that "[t]here is no mention of the due course of law provision in the pleadings or conclusions of law . . . ." But the District Court expressly referred to Article I section 19 in its declaratory judgment, slip opinion page 6 (reproduced in Appendix [I] to Application of Petitioners Edgewood Independent School District et al. for Writ of Error ("Edgewood Appendix")). In addition, as shown in the Edgewood Reply Brief 26-27, petitioners did plead violation of Article I section 19, and as shown in the Edgewood District's Appendix II ("Edgewood Appendix II"), Edgewood discussed the due course of law provision in its brief in the Court of Appeals.

vant, but is subordinate to the meaning fairly to be derived from the text. The historical context shows a Texas commitment to education going back to the Texas Declaration of Independence. The evolution of the provision that became Article VII section 7 shows a compromise that rejected highly centralized control but consciously imposed a duty on the Legislature to "make suitable provision for the support and maintenance of an efficient system of public free schools." The words of the Texas Constitution will not go away.

The evidence in the record and the findings of the trial court show that the children in the poor districts are not receiving the education mandated by Article VII section 1 and that their parents are being taxed in a unequal and inefficient manner to support the Texas education system. Article VII section 1 is not hortatory. This Court has described the maintenance and support of education as a "mandatory duty" of the Legislature. The people imposed it and it is the duty of this Court to enforce their will.

The school funding system also violates the equality provisions of Article I sections 3 and 3a. The words of Article VII section 1 and the prominence given to education both in the present Texas Constitution and in Texas history make it a fundamental right under the Texas Constitution. Neither respondents nor the majority in the Court of Appeals made even a pretense of claiming that the present system could be upheld under a compelling state interest inquiry.

But even if a more deferential rationality standard is imposed the system fails under Article I section 3. It is irrational, as the trial court showed in its detailed findings, which were not questioned by the Court of Appeals. The system cannot survive the inquiry that this Court applied to transfer rules for high school basketball players in Sullivan v. University Interscholastic League, 616 S.W.2d 170 (Tex. 1981). While not all Mexican-Americans and blacks go to schools in poor districts, so many of the students in the poor districts are members of minority groups that Article I section 3a is also violated.

Another inequity of the present system is that it favors taxpayers in the wealthy districts by allowing them to pay at considerably lower tax rates than taxpayers in the poor districts. Thus, taxpayers in the poor districts shoulder an unequal burden of the State's duty to make suitable provision for the support and maintenance of an efficient system of public free schools. At the same time, the children in those poor districts get inferior educations compared with the children in wealthy districts with lower tax rates. This violates both the equality provision of Article I section 3 and the due course of law provision of Article I section 19.

The unfairness of the Texas school funding system has been conceded for at least the last fifteen years. Many well-meaning agencies of government, state and federal, have wrung their hands. But the system continues to disserve the

children, the taxpayers and the State. The Constitution means what it says, and has been violated. It is the duty of this Court to enforce it by striking down the existing school funding system.

## ARGUMENT

### POINT I

THE TEXAS SCHOOL FUNDING SYSTEM VIOLATES ARTICLE VII SECTION 1, WHICH MEANS JUST WHAT IT SAYS: THE LEGISLATURE HAS VIOLATED ITS ESSENTIAL CONSTITUTIONAL DUTY TO PROVIDE AN EFFICIENT SYSTEM OF FREE PUBLIC SCHOOLS

#### A. The Words of the Constitution, and Not Excerpts From Debates or From Modern Commentators, Are What Govern Its Interpretation and Application.

Respondents devote many of the 200-odd pages of their several briefs to elaborate attempts to convince this Court that Article VII section 1 is not to be taken seriously. But they cannot escape its words:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Respondent Irving ISD[4] devotes its entire brief[5] to oppose any meaningful application of these plain words. It spends fifteen pages of its brief apparently arguing that this Court is bound by the personal feelings of delegates to the 1875 Constitutional Convention, Irving Brief 5-20, but then faults

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[4] Because the wealthier school districts have several law firms and the Attorney General's Office working for them they have been able to circumvent the fifty page limit on briefs by parceling out topics and adopting each others' arguments. The Irving ISD's brief is the main spear-carrier for respondents on this point, although other briefs make occasional forays into the issue of interpretation.

[5] Respondent Irving Independent School District's Brief in Response to Petitioners' and Petitioner-Intervenors' Applications for Writ of Error ("Irving Brief")

petitioners for "selective quoting of certain delegates and their views on education," saying that "[s]uch comments are useful only to the extent that they support reliable extra-judicial commentary by noted scholars and commentators. . . ." Irving Brief at 21. It then proceeds to argue that amendments that were not adopted in the 1970s and delegates' comments in 1974 should govern the interpretation, Irving Brief 23-34, and after faulting petitioners for citing out-of-state decisions on similar provisions in other states' constitutions, cites out-of-state decisions going its way. Irving Brief 37-38. About the only thing that the Irving Brief is reticent about is the text of Article VII section 1 itself.

In fact, this Court has consistently held that the words of the Constitution are controlling. Only a few years after the 1876 Constitution was adopted this Court made clear what the ultimate question was:

> The proceedings of a convention may be looked to in construing a clause of a constitution framed by it, when it is of doubtful construction; but such evidence is of but little importance,--the real question being, what did the people intend by adopting a constitution framed in language submitted to them?

Smissen v. State, 9 S.W. 112, 116 (Tex. 1888). A year earlier, this Court had written that:

> In the construction of a constitution it is to be presumed that the language in which it was written was carefully selected, and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions . . . .

Mellinger v. City of Houston, 3 S.W. 249, 252 (1887). In this approach the Court was in agreement with the leading constitutional treatise of the day, Thomas M. Cooley's Constitutional Limitations, which is cited on other points in both decisions. Cooley had written in 1871, four years before the Convention, that:

> Every member of a convention acts upon such motive and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. . . . And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people.

Cooley, Constitutional Limitations *66 (2d ed. 1871).

That we are not bound by the opinions of constitutional convention delegates remains an accepted tenet in modern times. Only a few years ago, this Court made clear that the intent of the people is what governs, and set out an extensive discussion of the proper approach to discern that intent:

> There are several well recognized principles of constitutional law which are applicable. This Court has stated, "The fundamental rule for the government of courts in the interpretation or construction of a Constitution is to give effect to the intent of the people who adopted it." Cox v. Robison, 105 Tex. 426, 150 S.W. 1149, 1151 (1912). In determining the intent of the framers, "Constitutional provisions, like statutes, are properly to be interpreted in light of conditions existing at the time of their adoption, the general spirit of the times, and the prevailing sentiments of the

people." Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, 35 (1931). In Markowsky v. Newman, 184 Tex. 440, 136 S.W.2d 808, 813 (1940), this court stated:

> . . . in determining the meaning, intent and purpose of a constitutional provision the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied, and the good to be accomplished, are proper subjects of inquiry.

Id. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007 (1934).

Director of Department of Agriculture and Environment v. Printing Industries Ass'n, 600 S.W.2d 264, 267 (Tex. 1980).

The Irving Brief quotes a small portion of this passage to suggest that it means that we are frozen by the specific opinions of the time at which the constitutional provision was adopted, but Director v. Printing Industries itself answers this reading. In that case private printers sought to enjoin the State from purchasing or using printing equipment because of an apparent conflict with Article XVI section 21 of the Constitution, which requires, with minor specific exceptions, that all state printing be done under contract with the lowest responsible bidder. This Court made a survey not only of the conditions in 1876 when the provision was adopted, but of developments since then. It found that the provision was intended by the people to prevent corruption, not to prevent the State from operating efficiently. The intent that this Court sought was the general intent of the people and the framers of the provision:

> The framers could not have envisioned the rapid growth of the State's word processing needs, nor the technical advances in the printing industry. Regardless of that fact, they did not intend to frustrate administrative expediency and economy by this provision, but rather, they intended to promote such virtues.

600 S.W.2d at 269.

Both the Irving Brief and the Edgewood Brief have quoted from the debates at the 1875 Convention. This is quite permissible, but only as long as we remember that the guiding issue is the meaning of the words in light of their adoption by the people over one hundred years ago. It is apparent that Article VII section 1 was the product of intense opposition among proponents of centralized state-wide education, proponents of local control and those who wanted no public education at all. In addition, there is another matter conveniently ignored in the Irving Brief: hostility to the education of the recently freed black slaves. As recounted by an important historian of the period:

> One group of fence cutters posted a note forcefully expressing their grievances which read: "Down with monopolies! They can't exist in Texas and especially in Coleman County. Away with your foreign capitalists! The range and soil of Texas belong to the heroes of the South. No monopolies, and don't tax us to school the nigger. . . .

Alwyn Barr, Reconstruction to Reform: Texas Politics, 1876-1906 (1971).

B. The Words of Article VII Section 1 Require That the Present School Funding System Be Struck Down

What emerges from the debates, both at the Convention and among the voters who actually adopted the Constitution, is disagreement upon details, but agreement on a general charge to the Legislature: because a general diffusion of knowledge is "essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

In a brief but important recent article, Professor H. Jefferson Powell, now of the Duke University Law School, considered the role of the text in constitutional interpretation. Powell, Parchment Matters: A Meditation on the Constitution as Text, 71 Iowa L. Rev. 1427, 1428 (1986).[6] Powell cannot be dismissed as either a liberal or a conservative apologist for a particular political agenda through the courts. He explained his reasons "for exploring the role of the text at this time" as due in large part to the fact that

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[6] Powell had previously shown that the current fixation on a narrow "framers' intent" approach is a historical; the framers of the American Constitution did not believe their debates relevant to subsequent interpretation because it was the people who had adopted the Constitution, not its drafters. See Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985). While he was concerned with the 1787 Federal Convention, his conclusions comport with those of this Court in Smissen v. State with respect to the Texas Constitution and of Cooley's Constitutional Limitations as a general nineteenth century constitutional approach.

> the supposed centrality of the text is under assault from more than one side. There are, on the one hand, those who implicitly or explicitly wish to recast American constitutional discourse into what they see as the freer and richer context of general moral debate. On the other hand, there are those who regard the text as the container for an encoded message, and the constitutionalist as the cryptographer equipped with the proper key, whether it be the "framers' intent" or the gospel of economic efficiency. Yet others, by far the largest group, do not so much undercut the text as they ignore it. For them the question of "the Constitution's" meaning is simply an inquiry into the possible implications of Supreme Court decisions.
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> Against all of these contemporary devaluations of the Constitution-as-historical-document, I will argue that the text has played, and should play, three vital roles -- definitional, conserving, and revolutionary -- in our political discussions.

Professor Powell explains the definitional function as forcing us not to discuss general political theories but specific phrases. "The way in which we formulate the questions, and the 'grammatical' constraints on the answers possible, both direct and limit our thinking and our action. The emphatic language of the first amendment . . . and even its somewhat fortuitous place at the beginning of the Bill of Rights have played no insignificant part in the intense concern for expressive liberty that characterizes modern American law." Id. at 1429.

Similar comments can be made with respect to Article VII section 1. Its words are clear and definite. It speaks of a "duty." It states why that duty is "essential" to the people's freedom and liberty. And it sets the Legislature a standard: to "make suitable provision for the support and

maintenance of an efficient system of public free schools." Even the placement of the section is significant. The people thought education important enough to devote a separate article to it, and they put the Legislature's duty at the head of that article; specific matters follow in later sections in the article, but the overriding direction is that the Legislature carry out its duty to support and maintain an efficient system of public free schools.

By the "conserving role of the text" Powell means that there is a place in the analysis for the historical and social context in which the provision was adopted; he rejects the idea that we may ignore this with impunity. "This unbreakable link that the text forges between present and past is the kernel of truth in the delusive pursuit of the 'original intent.'" But "[i]ntentionalism itself, to be sure, is fundamentally antitextual, for it treats the document as a mere occasion for a partial and always distorted recreation of what certain individuals wanted the text to accomplish." He quotes Justice Joseph Story in Story's 1833 Commentaries on the Constitution: "Nothing but the text was adopted by the people." Nonetheless, while the words of particular individuals at the time of adoption "are not and cannot be made to be the original meaning of the text[,] . . . those words, along with the rest of the complex and unruly history surrounding the text, do bear on its meaning for us today." Id. at 1431. This approach is similar to that discussed by this

Court in Mumme v. Marrs and Director v. Printing Industries, supra.

Public education has been a concern in Texas literally since before the Texas Revolution. The Texas Declaration of Independence listed as the fourth of the people's grievances that the Mexican government "has failed to establish any public system of education . . . although it is an axiom in political science, that unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self-government." The 1836 Constitution provided in Section 5 of its General Provisions that "It shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education." The 1845 Constitution devoted a separate article to Education, and its Article X section 1 contained much of the language that appears today in Article VII section 1: "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools." This provision was continued verbatim in the 1861 and 1866 Constitutions.

Until 1869, however, there had been a distinction between public schools and free schools. Article IX section 1 of the 1869 Constitution omitted the preambulary language and made it the duty of the Legislature to provide "public

free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years." Undoubtedly the centralized system set up by the Republican government was one of the major controversies at the 1875 Convention, though the "redemptionist" version given in the Irving Brief fails to show that the issue was much more complex than one of good Texans trying to drive out northern centralizing influences. As noted earlier, it involved racism, localism, unwillingness to pay taxes, and hostility to any public education at all.

The critical fact to remember is that the delegates returned the important introductory clause describing the general diffusion of knowledge as "essential to the preservation of the liberties and rights of the people," added a duty of the Legislature to "establish" and continued its duty to "make suitable provision for the support and maintenance" of what were now designated "public free schools," and added the requirement that this system be "efficient." It was this language that the people of Texas adopted in their 1876 Constitution. It seems clear that while the people did not want a highly centralized school system, they did want an efficient system of public free schools, and they made it the duty of the Legislature to establish such a system and to make suitable provision for its support and maintenance.

This brings us to what Powell calls "the revolutionary role of the text." What he means by that is that the words

simply won't go away -- even if we would be more comfortable if they did. "During the long, sad decades of Jim Crow, the text bore mute witness to the nation's prior recognition of the evil of racism. And in the end, the residual, common sense meaning of a phrase like 'the equal protection of the laws,' read against the backdrop of a civil war fought in part to end a racial caste system, empowered judges, lawmakers, and ordinary citizens to question and then to overthrow that caste system." Id. at 1433.

We have in Texas today a system that is in no way efficient and that does not provide the general diffusion of knowledge that the Texas Constitution has declared for more than one hundred years to be "essential." The Legislature has failed in its duty under that Constitution to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. Sixteen years ago the United States Supreme Court, by a 5-4 vote, bucked the issue back to the State of Texas. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Since then the Legislature has made some efforts, but these efforts have been inadequate. An entire generation of children has gone through the poorer school districts with most of them receiving inadequate educations, dropping out, and having children of their own who are now trapped in those same poor school districts. Still the words of Article VII section 1 remain. They will not go away.

C. Article VII Section 1 Is Not Window-dressing.

The Irving Brief claims that Article VII section 1 is nothing more than "a moral directive to the legislature." The only authority that it cites for this proposition is the undocumented comment that "[p]ublic education is not considered a 'core' or fundamental element in a state constitution . . . [and] is largely hortatory . . ." Irving Brief at 40, quoting from Braden, et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis (1977).

Earlier in the Irving Brief George Braden had been described as a "Texas constitutional scholar," Irving Brief at 10. In fact, Mr. Braden was the Corporation Counsel of Schenectady, New York, at the very time he was working on his book. While he had previously been connected with constitutional conventions in New York and Illinois, he does not appear to have had any connection with Texas before writing the book. See 1 Braden, et al. at xxv-xxvi ("Authors' Biographical Data"). Even more important, Mr. Braden apparently did not write the passage quoted in the Irving Brief. According to a chart of "Article and Section Authorship" in the book, the commentary on Article VII section 1 was written by one of Braden's assistants, Richard A. Yahr, an attorney with the Texas Legislative Council and a former assistant city attorney for the City of Dallas. See 1 Braden, et al. at xxvii, xxvi. We have no quarrel with either Mr. Braden or Mr. Yahr, but the bare conclusion of either is nothing more

than one lawyer's unsupported opinion, and hardly an authority for eviscerating a provision of the Constitution that goes back to the Texas Declaration of Independence.[7]

Much more to the point are this Court's words in Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, 35 (1931), where it said of Article VII section 1: "The purpose of this section as written was not only to recognize the inherent power in the Legislature to establish an educational system for the state, but also to make it the mandatory duty of that department to do so." Three times in that paragraph this Court used the phrase "mandatory duty," and while it spoke of the Legislature's discretion within that mandatory duty, it made clear that the discretion could not trammel the rights of citizens or create unreasonable differentiations among people.

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[7] The Irving Brief also seems to argue that Article VII section 1 approves of unequal education because the 1974 Constitutional Convention proposed to add the adjective "equitable" to the phrase "support and maintenance." The Constitutional Convention was held shortly after the United States Supreme Court had rejected the Fourteenth Amendment attack on the Texas school funding system in Rodriguez. It is not surprising that some delegates sought to clarify the Texas Constitution on the point. (It has, after all, taken fourteen more years for the issue to reach this Court by the litigation route.) But that an unsuccessful attempt was made to change the language is no proof that the existing language is in fact inadequate. On the propriety of citing non-judicial advocacy by current members of the Court, see the comments of Justice Robert Jackson when his arguments, as President Roosevelt's Attorney General, were cited for President Truman's steel seizure: "While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Thus, we have a clear directive that has been in the Constitution since 1876 and whose roots go back earlier than the Alamo. We have plain words that this Court has described as a mandatory duty. Against this, we have a system that favors the wealthy and those able -- or lucky enough -- to live in wealthy school districts. Given the explicit words of Article VII section 1, this Court has an obligation -- to the Constitution of Texas and to the people of Texas -- to hold that the Legislature violated its express duty in establishing the present school funding system.

## POINT II

THE PRESENT SCHOOL FUNDING SYSTEM VIOLATES ARTICLE I SECTIONS 3 AND 3A IN THAT IT DEPRIVES CHILDREN, MANY OF THEM MEXICAN-AMERICAN OR BLACK, OF THE EDUCATION DESCRIBED BY ARTICLE VII SECTION 1 AS "ESSENTIAL," WHILE OTHER CHILDREN, DIFFERING ONLY BY THE LOCATION OF THEIR HOUSES, ARE GIVEN SUPERIOR EDUCATIONS

The various respondents' briefs attempt to ignore or rationalize away Article VII's use of the word "essential" and the Dallas Court of Appeals' statement that: "Public education is a fundamental right guaranteed by the Texas constitution. TEX. CONST. art. VII." Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290, 295 (Tex. App. - Dallas 1987, writ ref'd n.r.e.), cert. denied, 108 S. Ct. 1082 (1988). The Eanes and Andrews Briefs, for example, both claim that the statement "is dicta." In fact, it is not dictum; the Court of Appeals was balancing the state interest in providing immunity to school teachers against the open courts provision of the Texas Constitution, and immediately before the sentence quoted the Court found that "[i]n the case at bar, the legislative purpose is compelling." It was compelling precisely because public education is a fundamental right in Texas. 733 S.W.2d at 295. But even more than the mere question of holding or dictum, the Stout opinion is justified both by the language of the Texas Constitution and because of the very distinction between the Texas Constitution and the United States Constitution. As the trial court

said, quoting the United States Supreme Court in Rodriguez: "The answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." Tr. 540 Curiously, the Eanes Brief on its page 17 urges this Court to ignore this language because the Supreme Court was not discussing the Texas Constitution at the time, but three pages later urges this Court to follow the Supreme Court's reasoning in Rodriguez that the nexus between education and speech and the right to vote does not make it a fundamental right for federal constitutional purposes (Eanes Brief at 20-21).

That, of course, is the whole point. The United States Constitution does not discuss education, as it is an obligation of the states. The Texas Constitution devotes a separate article to education, and has done so since the earliest days of the Republic. It uses the words "essential" and "duty." It states the nexus between the "general diffusion of knowledge" and "the preservation of the liberties and rights of the people" and describes it as "essential." It is hard to see what could be a clearer statement of the fundamental right of Texas children to an education.

If education is a fundamental right, only a compelling state interest could justify the disparities that the record shows, based on the classification of schoolchildren simply by where their houses are located. The respondents appear to concede that the present system cannot possibly meet a

compelling state interest test, since they do not even attempt to meet such a test. See Eanes Brief 8-32; Andrews Brief 8-24.

Even if this Court were not to find education a fundamental right under the Texas Constitution and were to apply only a rational relationship test, the funding system could not pass muster. It is simply irrational. As the trial court found, the district boundaries do "not follow any rational or articulated policy." Tr. 573-75. Similarly, the court showed at length that local control could not be used as a rationale, since the system is already centralized in almost every way except an equitable sharing of tax revenues: the trial court listed fourteen pages of examples of state mandates to the local districts. Tr. 578-91. Finally, the trial court found that there was no community of interest to be preserved by the funding system, since districts were a "crazy quilt," "frequently cross city and county boundaries in a random and inexplicable fashion," "actually fragment communities of interest," and in some instances "are nothing more than tax havens." Tr. 591-92. In fact, there is neither efficiency nor rationality in the present funding scheme.

In Sullivan v. University Interscholastic League, 616 S.W.2d 170 (Tex. 1981), this Court tested the transfer rules for high school basketball players under the Equal Protection Clause of the Fourteenth Amendment only, and found them

irrational because they were overbroad and overinclusive, and their purpose, the avoidance of recruiting in high school athletics, could be achieved under a narrower rule already on the books. As important as high school athletics are in Texas, it is submitted that a basic education is even more important. If it is irrational to require all transfer students who played varsity football or basketball to sit out a year, how much more irrational is it for one child to get a vastly inferior education than another solely because of the location of his house?

When we add the fact that the family in the poor district pays taxes at rates as much as twenty times higher for the inferior education, the irrationality is beyond dispute. (Even the Court of Appeals did not find the funding scheme rational.) Article I section 3 says that "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Yet the effect of the current funding system is to give separate public emoluments, in the form of the public free education described as essential by Article VII section 1, to some taxpayers and their children, while denying equal educations to others.

Although many Mexican-Americans have escaped poverty, there is no doubt that the bulk of the children in the poor districts is Mexican-American, while another sizable

percentage is black. In light of this, the self-operative provisions of the equal rights amendment, Article I section 3a, are also violated by the funding system. While the numbers between the Edgewood District and the Alamo Heights District have changed since Rodriquez, the disparity has not changed in these 16 years. Not only is it poor children who are educationally ravaged by the Texas system, it is poor minority children. For most children education is the only honest way out of poverty today. When we take that possibility away from minority children we cheat them in a most cruel way. That is a violation of the equality that is mandated by Article I section 3a.

## POINT III

### FAVORING TAXPAYERS IN WEALTHY DISTRICTS AT THE EXPENSE OF TAXPAYERS AND STUDENTS IN THE POORER DISTRICTS VIOLATES BOTH THE EQUALITY PROVISION OF ARTICLE 1 SECTION 3 AND THE DUE COURSE OF LAW PROVISION OF ARTICLE I SECTION 19

One of the most striking of the trial court's findings was that of the unequal tax burdens, especially as they favored those in the wealthy districts. As noted in the findings, a taxpaying family with an $80,000 house would pay $59 in the wealthy Iraan-Sheffield District, but would pay $1206 in the poor district of Leveretts Chapel. Tr. 554. Applying these rates, the owner of a $400,000 house in Iraan-Sheffield would pay $295 while the owner of a $40,000 house in Leveretts Chapel would pay $603.

There is something very wrong with a system that makes a family pay twice as much in taxes on a home worth one-tenth that of another family and then gives the rich family's children a much better education as well. The school districts are creatures of the state, and the taxes they levy are paid by the people of the state to carry on the education system that is a duty of the Legislature under Article VII section 1. Thus, we have taxes levied unevenly by instrumentalities of the State to provide constitutionally mandated public free educations on an uneven basis, and on a reverse Robin Hood basis at that.

This very year the United States Supreme Court unanimously struck down a West Virginia taxing system that based assessments on selling prices and had the effect of valuing

recently transferred property much higher than property that had not been recently sold. The effect was that neighboring property owners paid disparate taxes on similar property. As Chief Justice Rehnquist wrote for the Court, "[v]iewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioner equal protection of law." Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 109 S.Ct. 633, 639 (1989).

In Texas, education is expressly a duty of the State Legislature under Article VII section 1. The taxpayers in the poorer districts pay an unfair share of the statewide tax burden compared with the taxpayers in the wealthier districts. The tax system supporting the Texas public school system deprives the taxpayers in the poorer districts of the equality mandated by Article I section 3 and further deprives them of their property without due course of law, violating Article I section 19 by taking more from them and giving their children less in return. As the Supreme Court said in Allegheny Pittsburgh Coal, "[i]t is not theory, but the impact . . . that counts." 109 S.Ct. at 638, quoting from FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

## CONCLUSION

The words of the Texas Constitution are clear. The disparities under the present system are clear. The impact on the children is clear. The United States Supreme Court said in 1973 that the system was bad but that its solution was up to Texas. The Legislature has tried but failed. The children continue to suffer.

Equally, our State continues to suffer. Perpetuating the underclass by failing to give its children a decent education creates crime, deprives us of alert citizen and adds to economic inefficiency requiring public assistance. Meanwhile, wealthy taxpayers pay less than their fair share of taxes while state funds go for police, prisons and welfare.

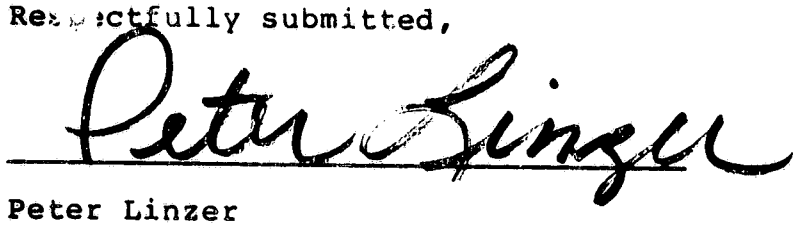
This is not merely as "good government" problem. The current school funding system violates both the words and the spirit of the Texas Constitution's Education Article, Article VII section 1, and of the Texas Constitution's Bill of Rights, Article I sections 3, 3a and 19. It also forgets-- or willfully ignores -- the words of the Texas patriots in the Texas Declaration of Independence: "unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self-government." This Court has a duty to enforce the Texas Constitution. Every other body of government has failed those children in the poor school districts: the United States Supreme Court, the Texas Legislature, and various

Texas governors all have cared and sympathized, and some even tried to help, albeit with half-measures. But the children in the poor school districts still have bad schools and their parents still pay taxes at higher rates than the parents in the wealthy districts that provide their children with good schools at lower tax rates.

This Court can, if it chooses, find ways to wash its hands and give apologies for not acting. But the Texas Constitution deserves more than lip-service. Its provisions have meaning, and it is only this Court that can enforce them. The children of Texas have nowhere else to look. It is up to this Court to answer their needs by enforcing the Texas Constitution.

Dated: April 7, 1989.

Respectfully submitted,



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I certify that a true copy of this document was mailed to the following counsel of record on April 10, 1989:

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NO. C-8353

IN THE

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TO THE SUPREME COURT OF TEXAS:

Amicus Curiae, Vista Del Sol PTO from the Socorro Independent School District, file this Brief in Support of Petitioners, Edgewood Independent School District, et al., and Petitioner-Intervenors, Alvarado Independent School District, et al.

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## INTEREST OF THE AMICUS CURIAE

The undersigned are officials of school districts in Texas and others concerned with the quality of public education in this State. Our interest is in the education of the children of Texas.

The trial court's extensive findings of fact have been undisturbed on appeal. These fact findings depict well the gross inequity of the Texas school finance system. It is these inequities and disparities that we, like all school districts of limited taxable wealth, confront and combat on a daily basis.

There is a vast disparity in local property wealth among the Texas school districts. (Tr. 548-50).[1] The Texas school finance system relies heavily on local district taxation. (Tr. 548). These two factors result in enormous differences in the quality of educational programs offered across the State.

There is a direct positive relationship between the amount of property wealth per student in a district and the amount the district spends on education. (Tr. 555). Because their tax bases are so much lower, poorer districts must tax at higher tax rates than the wealthier districts. Even with higher tax rates, however, poorer districts are unable to approach the level of expenditures maintained by wealthier districts. Wealthier districts, taxing at much lower rates, are able to spend significantly more per student. Conversely, poorer districts endure a much higher tax burden, yet are still unable to adequately fund their educational programs.

The interdependence of local property wealth, tax burden, and expenditures, which is so debilitating to the property-poor school districts, is revealed in numerous fact findings of trial court. For example, the wealthiest school district in Texas has more than $14,000,000 of property wealth per student, while the poorest district has approximately $20,000 of property wealth per student, a ratio of 700 to 1. (Tr. 548). The range of local tax rates in 1985-86 was from $.09 (wealthy district) to $1.55 (poor district) per $100.00 valuation, a ratio in excess of 17 to 1. By comparison, the range of expenditures

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As the trial court found, differences in expenditure levels operate to "deprive students within the poor districts of equal educational opportunities." (Tr. 552). Increased financial support enables wealthy school districts to offer much broader and better educational experiences to their students. (Tr. 559). Such better and broader educational experiences include more extensive curricula, enhanced educational support through additional training materials and technology, improved libraries, more extensive counseling services, special programs to combat the dropout problem, parenting programs to involve the family in the student's educational experience, and lower pupil-teacher ratios. (Tr. 59). In addition, districts with more property wealth are able to offer higher teacher salaries than poorer districts in their areas, allowing wealthier districts to recruit, attract, and retain better teachers for their students. (Tr. 559).

The denial of equal educational opportunities is especially harmful to children from low-income and language-minority families. As the trial court found, "children with the greatest educational needs are heavily concentrated in the State's poorest districts." (Tr. 562). It is significantly more expensive to provide an equal educational opportunity to low-income children and Mexican American children than to educate higher income and non-minority children. (Tr. 563). Therefore, the children whose need for an equal educational opportunity is greatest are denied this opportunity.

Not only are the disparities and inequities found to exist by the trial court shocking, they render the Texas school finance system constitutionally infirm.

## ARGUMENT

### I. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS (Op. 3-13).

### A.

The denial of equal educational opportunity violates a fundamental right under the Texas Constitution. "Fundamental rights have their genesis in the expressed and implied protections of personal liberty recognized in federal and state constitutions." Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985). Recognizing that education is "essential to the preservation of the liberties and the rights of the people," Article VII, Section 1 imposes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of an efficient school system. See, e.g., Bowman v. Lumberton I.S.D., 32 Tex.Sup.Ct.J.104, 106 (Dec. 7, 1988). Article I, Section 3 guarantees the equality of rights of all citizens. It is in these two constitutional provisions that equal educational opportunity has its genesis as a fundamental right in the Texas Constitution.

Thus, our state constitution, unlike the federal Constitution, expressly declares the fundamental importance of education. Education

provides the means -- the capacity -- to exercise all critical rights and liberties. Education gives meaning and substance to other fundamental rights, such as free speech, voting, worship, and assembly, each guaranteed by the Texas Constitution. A constitutional linkage exists between education and the "essential principles of liberty and free government," protected by the Texas Bill of Rights. Tex. Const., Art. I, Introduction to the Bill of Rights.

The Texas Legislature and Texas courts have also recognized that the Texas Constitution protects against the denial of equal educational opportunity. In authorizing the creation of the Gilmer-Aikin Committee to study public education in Texas, the Legislature recognized "the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all." Tex. H.C.Res. 48, 50th Leg. (1948). Moreover, Section 16.001 of the Texas Education Code, enacted in 1979, recognizes the policy of the State of Texas to provide a "thorough and efficient" education system "so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors." Two courts have concluded that Article VII, Section I's efficiency mandate connotes equality of opportunity. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931); Watson v. Sabine Royalty, 120 S.W.2d 938 (Tex.Civ.App. -- Texarkana 1938, writ ref'd). Finally, the only other Texas appellate court to directly confront the fundamental right question has concluded, citing Article VII, that education is indeed a fundamental right

guaranteed by the Texas Constitution. Stout v. Grand Prairie I.S.D., 733 S.W.2d 290, 294 (Tex.App.-- Dallas 1987, writ ref'd n.r.e.).

B.

Wealth is a suspect category in the context of discrimination against low-income persons by a state school finance system. Serrano v. Priest (II), 18 Cal.3d 728, 557 P.2d 929,957, 135 Cal. Rptr. 345 (1976). In addition, a fundamental right cannot be denied because of wealth. Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1969). Justice Gammage, in his dissenting opinion, ably distinguishes San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973), the sole case relied upon by the Court of Appeals in its suspect classification analysis. (Diss.Op. 9-10). The Rodriguez Court observed: "there is no basis on the record in this case for assuming that the poorest people -- defined by reference to any level of absolute impecunity -- are concentrated in the poorest districts." 36 L.Ed.2d at 37 (emphasis added). Unlike the Rodriguez Court, this Court now benefits from a record replete with substantiated and undisputed findings on the wealth issue. (Tr. 562-565). For example, "[t]here is a pattern of a great concentration of both low-income families and students in the poor districts and an even greater concentration of both low-income students and families in the very poorest districts." (Tr. 563).

C.

Because the Texas school finance system infringes upon a fundamental right and/or burdens an inherently suspect class, the system is subject to strict or heightened equal protection scrutiny. Stamos, 695 S.W.2d at 560. This standard of review requires that the infringement upon a fundamental right, or the burden upon a suspect class must be "reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." T.S.E.U. v. Department of Mental Health, 746 S.W.2d 203, 205 (Tex.. 1987). The Texas school finance system surely cannot survive this heightened level of scrutiny. Even the United States Supreme Court recognized as much in Rodriguez. 36 L.Ed.2d at 33.

D.

Neither does the Texas school finance system satisfy rational basis analysis. In Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985), this Court articulated its own rational basis test to determine the reach of the equal rights provision of the Texas Constitution. Drawing upon the reasoning of Sullivan v. University Interscholastic League, 599 S.W.2d 170 (Tex. 1981), the Court fashioned a "more exacting standard" of rational basis review. Whitworth, 699 S.W.2d at 196. As the Court stated in Sullivan, equal protection analysis requires the court to "reach and determine the question whether the classifications drawn in a

statute are reasonable in light of is purpose." Sullivan, 616 S.W.2d at 172. The Texas school finance system cannot withstand review under the Texas rational basis test. "Local control" has been proffered as a justification, but this concept marks the beginning, not the end, of the inquiry. Local control does not mean control over the formation or financing of school districts. These are State functions, for school districts are "subdivisions of state government, organized for convenience in exercising the governmental function of establishing and maintaining public free schools for the benefit of the people." Lee v. Leonard I.S.D., 24 S.W.2d 449, 450 (Tex.Civ.App. -- Texarkana 1930, writ ref'd).

In contrast to local control, there are two constitutionally and statutorily stated purposed underlying the Texas school finance system. First, Article VII, Section 1, of the Constitution commands the Texas Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Second, Section 16.001 of the Texas Education Code expresses the State policy that "a thorough and efficient system be provided ... so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors."

The Texas school finance system is not rationally related to any of the above-discussed alleged or actual purposes. The trial court made a number of fact findings which bear directly upon the rationality of

the system. The findings reveal the vast disparity in property wealth (Tr. 548-49), tax burden (Tr. 553-55), and expenditures (Tr. 551-60); the failure of state allotments to cover the real cost of education (Tr. 565-68); and the denial of equal educational opportunity to many Texas school children (Tr. 601). The irrationality endemic to the Texas system of school finance has also been recognized, and criticized, by every serious study of public education in Texas ever undertaken, including the Statewide School Adequacy Survey, prepared for the State Board of Education in 1935; the Gilmer-Aikin Committee Report of 1948; and the Governor's Committee on Public School Education Report of 1968.

E.

Finally, the Texas system of funding public education is in no way legitimated or authorized by Article VII, Section 3 of the Texas Constitution. That section merely authorizes the Legislature to create school districts and, in turn, to authorize those districts to levy ad valorem taxes. The court of appeals would have us accept the rather strange notion that whenever the Constitution authorizes the Legislature to act, the courts are foreclosed from constitutional equal rights review of the product of the Legislature's actions. The Legislature created school districts in Texas, authorized them to tax, and allocated 50% of the funding of public education in Texas to ad valorem taxes generated from local tax bases. Inasmuch as "school districts are but subdivisions of the state government, organized for convenience in

exercising the governmental function of establishing and maintaining public free schools for the benefit of the people," no amount of sophistry will permit the State to avoid judicial review of its product. Lee, 24 S.W.2d at 450.

## II. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION DOES NOT MEET THE MANDATORY DUTY IMPOSED UPON THE LEGISLATURE BY THE TEXAS CONSTITUTION TO MAKE SUITABLE PROVISION FOR THE SUPPORT AND MAINTENANCE OF AN EFICIENT PUBLIC SCHOOL SYSTEM (Op. 13).

The court of appeals erred in refusing to determine whether the current system meets the constitutional duty imposed upon the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. Art. VII, §1. "Suitable" and "efficient" are words with meaning; they represent standards which the Legislature must meet in providing a system of public free schools. If the system falls below that standard -- if it is inefficient or not suitable -- then the Legislature has not discharged its constitutional duty and the system should be declared unconstitutional. Courts are competent to make this inquiry. The findings of the trial court, and the conclusions reached in every serious study of Texas education, reveal the gross inefficiency and inequity of the current Texas school finance system.

## III. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE DUE COURSE OF LAW PROVISION OF THE TEXAS CONSTITUTION (Op. 15).

State officials have thrust increasingly heavy financial burdens upon local school districts. Wealthy districts have little trouble

meeting these obligations; but for poorer districts, such state-imposed mandates have required substantial increases in property tax rates. The disproportionate burdens imposed upon poorer districts constitute deprivations of property without due course of law, in violation of Article I, Section 19 of the Texas Constitution. In addition, the disparate burdens imposed by the State fly in the face of the constitutional mandate that taxation "shall be equal and uniform." Tex.Const. Art. VIII,§1.

## CONCLUSION AND PRAYER FOR RELIEF

The trial court correctly concluded of the Texas system of funding public education: "The wealth disparities among school districts in Texas are extreme, and given the heavy reliance placed upon local property taxes in the funding of Texas public education, these disparities in property wealth among school districts result in extreme and intolerable disparities in the amounts expended for education between wealthy and poor districts with the result that children in the property poor school districts suffer a denial of equal educational opportunity." (Tr. 592). For the reasons stated in this Brief, the undersigned amicus curiae request that this Court reverse the judgement of the court of appeals and affirm the judgement of the trial court. We must no longer tolerate an educational system that perpetuates such inequity.

Respectfully submitted,

Elizabeth A. Otty

Vista del Sol PTO pres.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief in Support of Petitioners' and Petitioner-Intervenors' Applications for Writ of Error has been sent on this 2nd day of May, 1989, by United States Mail, postage prepaid to all counsel of record.

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### I. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS (Op. 3-13).

### A.

The denial of equal educational opportunity violates a fundamental right under the Texas Constitution. "Fundamental rights have their genesis in the expressed and implied protections of personal liberty recognized in federal and state constitutions." Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985). Recognizing that education is "essential to the preservation of the liberties and the rights of the people," Article VII, Section 1 imposes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of an efficient school system. See, e.g., Bowman v. Lumberton I.S.D., 32 Tex.Sup.Ct.J.104, 106 (Dec. 7, 1988). Article I, Section 3 guarantees the equality of rights of all citizens. It is in these two constitutional provisions that equal educational opportunity has its genesis as a fundamental right in the Texas Constitution.

Thus, our state constitution, unlike the federal Constitution, expressly declares the fundamental importance of education. Education

provides the means -- the capacity -- to exercise all critical rights and liberties. Education gives meaning and substance to other fundamental rights, such as free speech, voting, worship, and assembly, each guaranteed by the Texas Constitution. A constitutional linkage exists between education and the "essential principles of liberty and free government," protected by the Texas Bill of Rights. Tex. Const., Art. I, Introduction to the Bill of Rights.

The Texas Legislature and Texas courts have also recognized that the Texas Constitution protects against the denial of equal educational opportunity. In authorizing the creation of the Gilmer-Aikin Committee to study public education in Texas, the Legislature recognized "the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all." Tex. H.C.Res. 48, 50th Leg. (1948). Moreover, Section 16.001 of the Texas Education Code, enacted in 1979, recognizes the policy of the State of Texas to provide a "thorough and efficient" education system "so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors." Two courts have concluded that Article VII, Section I's efficiency mandate connotes equality of opportunity. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931); Watson v. Sabine Royalty, 120 S.W.2d 938 (Tex.Civ.App. -- Texarkana 1938, writ ref'd). Finally, the only other Texas appellate court to directly confront the fundamental right question has concluded, citing Article VII, that education is indeed a fundamental right

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Because the Texas school finance system infringes upon a fundamental right and/or burdens an inherently suspect class, the system is subject to strict or heightened equal protection scrutiny. Stamos, 695 S.W.2d at 560. This standard of review requires that the infringement upon a fundamental right, or the burden upon a suspect class must be "reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." T.S.E.U. v. Department of Mental Health, 746 S.W.2d 203, 205 (Tex.. 1987). The Texas school finance system surely cannot survive this heightened level of scrutiny. Even the United States Supreme Court recognized as much in Rodriguez. 36 L.Ed.2d at 33.

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the system. The findings reveal the vast disparity in property wealth (Tr. 548-49), tax burden (Tr. 553-55), and expenditures (Tr. 551-60); the failure of state allotments to cover the real cost of education (Tr. 565-68); and the denial of equal educational opportunity to many Texas school children (Tr. 601). The irrationality endemic to the Texas system of school finance has also been recognized, and criticized, by every serious study of public education in Texas ever undertaken, including the Statewide School Adequacy Survey, prepared for the State Board of Education in 1935; the Gilmer-Aikin Committee Report of 1948; and the Governor's Committee on Public School Education Report of 1968.

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Finally, the Texas system of funding public education is in no way legitimated or authorized by Article VII, Section 3 of the Texas Constitution. That section merely authorizes the Legislature to create school districts and, in turn, to authorize those districts to levy ad valorem taxes. The court of appeals would have us accept the rather strange notion that whenever the Constitution authorizes the Legislature to act, the courts are foreclosed from constitutional equal rights review of the product of the Legislature's actions. The Legislature created school districts in Texas, authorized them to tax, and allocated 50% of the funding of public education in Texas to ad valorem taxes generated from local tax bases. Inasmuch as "school districts are but subdivisions of the state government, organized for convenience in

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meeting these obligations; but for poorer districts, such state-imposed mandates have required substantial increases in property tax rates. The disproportionate burdens imposed upon poorer districts constitute deprivations of property without due course of law, in violation of Article I, Section 19 of the Texas Constitution. In addition, the disparate burdens imposed by the State fly in the face of the constitutional mandate that taxation "shall be equal and uniform." Tex.Const. Art. VIII,§1.

## CONCLUSION AND PRAYER FOR RELIEF

The trial court correctly concluded of the Texas system of funding public education: "The wealth disparities among school districts in Texas are extreme, and given the heavy reliance placed upon local property taxes in the funding of Texas public education, these disparities in property wealth among school districts result in extreme and intolerable disparities in the amounts expended for education between wealthy and poor districts with the result that children in the property poor school districts suffer a denial of equal educational opportunity." (Tr. 592). For the reasons stated in this Brief, the undersigned amicus curiae request that this Court reverse the judgement of the court of appeals and affirm the judgement of the trial court. We must no longer tolerate an educational system that perpetuates such inequity.

Respectfully submitted,

Ford King, Superintendent
Woden ISD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief in Support of Petitioners' and Petitioner-Intervenors' Applications for Writ of Error has been sent on this 2nd day of May, 1989, by United States Mail, postage prepaid to all counsel of record.

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NO. C-8353

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

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TO THE SUPREME COURT OF TEXAS:

Amicus Curiae, O'Shea-Kelerher PTA from the Socorro Independent School District, file this Brief in Support of Petitioners, Edgewood Independent School District, et al., and Petitioner-Intervenors, Alvarado Independent School District, et al.

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## INTEREST OF THE AMICUS CURIAE

The undersigned are officials of school districts in Texas and others concerned with the quality of public education in this State. Our interest is in the education of the children of Texas.

The trial court's extensive findings of fact have been undisturbed on appeal. These fact findings depict well the gross inequity of the Texas school finance system. It is these inequities and disparities that we, like all school districts of limited taxable wealth, confront and combat on a daily basis.

There is a vast disparity in local property wealth among the Texas school districts. (Tr. 548-50).[1] The Texas school finance system relies heavily on local district taxation. (Tr. 548). These two factors result in enormous differences in the quality of educational programs offered across the State.

There is a direct positive relationship between the amount of property wealth per student in a district and the amount the district spends on education. (Tr. 555). Because their tax bases are so much lower, poorer districts must tax at higher tax rates than the wealthier districts. Even with higher tax rates, however, poorer districts are unable to approach the level of expenditures maintained by wealthier districts. Wealthier districts, taxing at much lower rates, are able to spend significantly more per student. Conversely, poorer districts endure a much higher tax burden, yet are still unable to adequately fund their educational programs.

The interdependence of local property wealth, tax burden, and expenditures, which is so debilitating to the property-poor school districts, is revealed in numerous fact findings of trial court. For example, the wealthiest school district in Texas has more than $14,000,000 of property wealth per student, while the poorest district has approximately $20,000 of property wealth per student, a ratio of 700 to 1. (Tr. 548). The range of local tax rates in 1985-86 was from $.09 (wealthy district) to $1.55 (poor district) per $100.00 valuation, a ratio in excess of 17 to 1. By comparison, the range of expenditures

[1]The Transcript is cited as "Tr." The pages of the Transcript cited in this Brief contain the trial court's Findings of Fact and Conclusions of Law.

per student in 1985-86 was from $2,112 per student (poor district) to $19,333 (wealthy district). (Tr. 550-52).

As the trial court found, differences in expenditure levels operate to "deprive students within the poor districts of equal educational opportunities." (Tr. 552). Increased financial support enables wealthy school districts to offer much broader and better educational experiences to their students. (Tr. 559). Such better and broader educational experiences include more extensive curricula, enhanced educational support through additional training materials and technology, improved libraries, more extensive counseling services, special programs to combat the dropout problem, parenting programs to involve the family in the student's educational experience, and lower pupil-teacher ratios. (Tr. 559). In addition, districts with more property wealth are able to offer higher teacher salaries than poorer districts in their areas, allowing wealthier districts to recruit, attract, and retain better teachers for their students. (Tr. 559).

The denial of equal educational opportunities is especially harmful to children from low-income and language-minority families. As the trial court found, "children with the greatest educational needs are heavily concentrated in the State's poorest districts." (Tr. 562). It is significantly more expensive to provide an equal educational opportunity to low-income children and Mexican American children than to educate higher income and non-minority children. (Tr. 563). Therefore, the children whose need for an equal educational opportunity is greatest are denied this opportunity.

Not only are the disparities and inequities found to exist by the trial court shocking, they render the Texas school finance system constitutionally infirm.

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There is a vast disparity in local property wealth among the Texas school districts. (Tr. 548- .[1] The Texas school finance system relies heavily on local district taxation. (Tr. 548). These two factors result in enormous differences in the quality of educational programs offered across the State.

There is a direct positive relationship between the amount of property wealth per student in a district and the amount the district spends on education. (Tr. 555). Because their tax bases are so much lower, poorer districts must tax at higher tax rates than the wealthier districts. Even with higher tax rates, however, poorer districts are unable to approach the level of expenditures maintained by wealthier districts. Wealthier districts, taxing at much lower rates, are able to spend significantly more per student. Conversely, poorer districts endure a much higher tax burden, yet are still unable to adequately fund their educational programs.

The interdependence of local property wealth, tax burden, and expenditures, which is so debilitating to the property-poor school districts, is revealed in numerous fact findings of the trial court. For example, the wealthiest school district in Texas has more than $14,000,000 of property wealth per student, while the poorest district has approximately $20,000 of property wealth per student, a ratio of 700 to I. (Tr. 548). The range of local tax rates in 1985-86 was from $0.09 (wealthy district) to $1.55 (poor district) per $100.00 valuation, a ratio in excess of 17 to I. By comparison, the range of expenditures per student in 1985-86 was from $2,112 per student (poor district) to $19,333 (wealthy district). (Tr. 550-52).

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[1] The transcript is cited at "Tr." The pages of the Transcript cited in this Brief contain the trial court's Findings of Fact and Conclusions of Law.

As the trial court found, differences in expenditure levels operate to "deprive students within the poor districts of equal educational opportunities." (Tr. 552). Increased financial support enables wealthy school districts to offer much broader and better educational experiences to their students. (Tr. 559). Such better and broader educational experiences include more extensive curricula, enhanced educational support through additional training materials and technology, improved libraries, more extensive counseling services, special programs to combat the dropout problem, parenting programs to involve the family in the student's educational experience, and lower pupil-teacher ratios. (Tr.559). In addition, districts with more property wealth are able to offer higher teacher salaries than poorer districts in their areas, allowing wealthier districts to recruit, attract, and retain better teachers for their students. (Tr. 559).

The denial of equal educational opportunities is especially harmful to children from low-income and language-minority families. As the trial court found, "children with the greatest educational needs are heavily concentrated in the State's poorest districts." (Tr. 562). It is significantly more expensive to provide an equal educational opportunity to low-income children and Mexican American children than to educate higher income and non-minority children. (Tr. 563). Therefore, the children whose need for an equal educational opportunity is greatest, are denied this opportunity.

Not only are the disparities and inequities found to exist by the trial court shocking, they render the Texas school finance system constitutionally infirm.

## ARGUMENT

## I. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS (OP. 3-13).

### A.

The denial of equal educational opportunity violates a fundamental right under the Texas Constitution. "Fundamental rights have their genesis in the expressed and implied protections of personal liberty recognized in federal and state constitutions." Spring Branch I.S.D. v. Stamos, 695 S.W. 2d 556, 560 (Tex.1985). Recognizing that education is "essential to the preservation of the liberties and the rights of the people," Article VII, Section I imposes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of an efficient school system. See, e.g., Bowman v. Lumberton I.S.D., 32 Tex. Sup. Ct. J.104, 106 (Dec. 7, 1988). Article I, Section 3 guarantees the equality of rights of all citizens. It is in these two constitutional provisions that equal educational opportunity has its genesis as a fundamental right in the Texas Constitution.

Thus, our state Constitution, unlike the federal Constitution, expressly declares the fundamental importance of education. Education provides the means -- the capacity -- to exercise all critical rights and liberties. Education gives meaning and substance to other fundamental rights, such as free speech, voting worship, and assembly, each guaranteed by the Texas Constitution. A constitutional linkage exists between education and the "essential principles of liberty and free government,"

protected by the Texas Bill of Rights. Tex. Const., Art.I, Introduction to the Bill of Rights.

The Texas Legislature and Texas courts have also recognized that the Texas Constitution protects against the denial of equal educational opportunity. In authorizing the creation of the Gilmer-Aikin Committee to study public education in Texas, the Legislature recognized "the foresight and evident intentions of the founders of our State and the Framers of our State Constitution to provide equal educational advantages for all." Tex. H.C. Res. 48, 50th. Leg. (1948). Moreover, Section 16.001 of the Texas Education Code, enacted in 1979, recognizes the policy of the State of Texas to provide a "thorough and efficient" education system "so that each student . . . shall have access to programs and services . . . that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors." Two courts have concluded that Article VII, Section I's efficiency mandate connotes equality of opportunity. Mumme v. Marrs , 40 S.W. 2d 31 (Tex. 1931); Watson v. Sabine Royalty, 120 S.W. 2d 938 (Tex. Civ. App. -- Texarkana 1938, writ ref'd). Finally, the only other Texas appellate court to directly confront the fundamental right question has concluded, citing Article VII, that education is indeed a fundamental right quaranteed by the Texas Constitution. Stout v. Grand Prairie I.S.D. , 733 S.W. 2d 290, 294 (Tex. App. -- Dallas 1987, writ ref'd n.r.e.).

B.

Wealth is a suspect category in the context of discrimination against low-income persons by a state school finance system. Serrano v. Priest (II), 18 Cal 3d 728, 557 P. 2d 929, 957, 135 Cal. Rptr. 345 (1976). In addition, a fundamental right cannot be denied because of wealth. Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600 (1969). Justice Gammage, in his dissenting opinion, ably distinguishes San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 36 L. Ed. 2d 16 (1973), the sole case relied upon by the Court of Appeals in its suspect classification analysis. (Diss. Op. 9-10). The Rodriguez Court observed: "there is no basis on the record in this case for assuming that the poorest people -- defined by reference to any level of absolute impecunity -- are concentrated in the poorest districts." 36 L. Ed. 2d at 37 (emphasis added). Unlike the Rodriguez Court, this Court now benefits from a record replete with substantiated and undisputed findings on the wealth issue. (Tr. 562-565). For example, (t) here is a pattern of a great concentration of both low-income families and students in the poor districts and an even greater concentration of both low-income students and families in the very poorest districts." (Tr. 563).

C.

Because the Texas school finance system infringes upon a fundamental right and/or burdens an inherently suspect class, the system is subject to strict or heightened equal protection scrutiny. Stamos, 695 S.W. 2d at 560. This standard of review requires that the infringement upon a fundamental right, or the burden upon a suspect class must be "reasonably